Supreme Court, U. S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 77-752

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Brief of Certain Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange, as Amici Curiae.

SHARP WHITMORE,
2029 Century Park East,
Los Angeles, Calif. 90067,
Attorney for Certain Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange, Amici Curiae.

MICHAEL D. RYAN,
H. FREDERICK TEPKER,
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, Calif. 90071,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Interest of the Amici Curiae 1

Summary of Argument 2

Argument 4

I

Introduction 4

II

Catholic High Schools Are an Integral Part of the Religious Mission of the Catholic Church 5

III

The Board's Bargaining Unit Determinations Exemplify the Inevitable Interference With the Free Exercise of Religion Caused by Board Jurisdiction 8

A. The Concept of a "Community of Faith" at Each Catholic High School Is a Fundamental Precept of Catholic Education and Religion 8

B. The Board's Bargaining Unit Determinations Are Destructive of the "Communities of Faith" 10

C. The Board's Interference With the "Communities of Faith" Violates the Free Exercise Clause of the First Amendment 13

IV

The Application of the Act to Catholic High Schools Inevitably Entangles Government Authority With the Essential Religious Functions of the Schools 15

Page

A. Board Jurisdiction Will Necessarily Involve Surveillance and Improper Direction of Church Schools 15

B. Board Jurisdiction Will Inhibit the Free Development of Religious Doctrine in Catholic Schools 19

V

Conclusion 22

TABLE OF AUTHORITIES CITED

Cases Page

Abington School Dist. v. Schempp (1963), 374 U.S. 203, 10 L.Ed.2d 844 13

Atlas Engine Works, Inc. v. N.L.R.B. (1969), 395 U.S. 828 20

Cap Santa Vue, Inc. v. N.L.R.B. (D.C.Cir. 1970), 424 F.2d 883 18

Cardinal Timothy Manning, A Corporation Sole (1976), 223 NLRB 1218 .....4, 11, 12

Cardinal Timothy Manning, etc., et al. v. National Labor Relations Board, et al. (9th Cir., No. 77-1286) 1, 2, 4, 19

Caulfield v. Hirsch (E.D.Pa. July 7, 1977, No. 76-279), 95 LRRM 3164 .....11, 12, 16, 18

Darlington Mfg. Company (1967), 165 NLRB 1047, enforced, 397 F.2d 760 (4th Cir. 1968), cert. den., 398 U.S. 1023 (1968) 17

Drennon Food Production Company (1959), 122 NLRB 1359 17

Fibreboard Paper Products Corp. v. N.L.R.B. (1964), 379 U.S. 203 16

Garwin Corp. (1965), 153 NLRB 664, enforced in part, 374 F.2d 295 (D.C.Cir. 1967) 17

Kedroff v. St. Nicholas Cathedral (1952), 344 U.S. 94, 97 L.Ed. 120 .....13, 14

Lemon v. Kurtzman (1971), 403 U.S. 602, 29 L.Ed.2d 745 .....2, 5, 6, 7, 18, 21

May Department Stores Company (1962), 136 NLRB 797 17

NAACP v. Button (1963), 371 U.S. 415 5

Page

N.L.R.B. v. Catholic Bishop of Chicago (U.S., No. 77-752) 19

N.L.R.B. v. Gissel Packing Company (1969), 395 U.S. 575 17

N.L.R.B. v. Jones & Laughlin S. Corp. (1937), 301 U.S. 1 23

N.L.R.B. v. Pembeck Oil (2d Cir. 1968), 404 F.2d 105 20

N.L.R.B. v. Truitt Mfg. Company (1956), 351 U.S. 149 18

New York Times v. Sullivan (1965), 376 U.S. 254 21

Presbyterian Church v. Hull Church (1968), 393 U.S. 440 19

Roman Catholic Diocese of Brooklyn (1978), 236 NLRB No. 3, 98 LRRM 1359 .....12, 17

Serbian Eastern Orthodox Diocese v. Milivojevich (1976), 426 U.S. 696, 49 L.Ed.2d 151 .....13, 15

Speiser v. Randall (1958), 357 U.S. 513 20

Textile Workers Union v. Darlington Mfg. Company (1965), 380 U.S. 263 17

Walz v. Tax Commission (1969), 397 U.S. 664 .....21, 22

Wolman v. Walter (1977) 433 U.S. 229 22

Regulations

Code of Federal Regulations, Title 29, Sec. 103.1 .. 8

Rules

Rules of the Supreme Court of the United States, Rule 42 1

Statute

Page

United States Constitution, First Amendment 2, 4, 5, 6, 12, 13, 14, 19, 21, 22, 23

Textbook

Comment, "The Free Exercise Clause, the NLRA, and Parochial School Teachers," 126 U.Pa.L. Rev. 631 (1978) 5, 20

IN THE

Supreme Court of the United States

October Term, 1978
No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Brief of Certain Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange, as Amici Curiae.

This Brief Amici Curiae in support of the position of the Respondents is filed with the consent of all parties,[1] as provided in Rule 42 of the Rules of this Court.

Interest of the Amici Curiae.

This *amici curiae* brief is filed on behalf of the petitioners and cross-respondents in *Cardinal Timothy Manning, etc., et al. v. National Labor Relations Board,*

[1]Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

et al. (9th Cir., No. 77-1286).[2] That case now pending before the United States Court of Appeals for the Ninth Circuit arose on petition for review of an order of the National Labor Relations Board (the Board).

The *amici curiae* (the Schools) requested that the Court of Appeals review and set aside the Board's assertion of jurisdiction over them on grounds that the order of the Board violated the First Amendment. Specifically, the Schools have asserted: (1) that Board jurisdiction will improperly entangle governmental authority with the essential religious functions of these private Catholic Schools; and (2) that Board jurisdiction will improperly interfere with the Schools' free exercise of religion. Thus, constitutional issues identical to those raised before the Court of Appeals for the Ninth Circuit are presented in this case.

Summary of Argument.

Board jurisdiction over Catholic high schools violates the principle of the First Amendment that Church and state shall remain separate. First, the scope and intrusiveness of Board jurisdiction inevitably involves excessive government entanglement with the essential religious functions of the Catholic high schools. The relationship between the Board and the Schools, like the relationship between the state and the schools in *Lemon v. Kurtzman* (1971), 403 U.S. 602, 620, is

[2]The amici curiae are certain Catholic high schools within the geographical boundaries of the Archdiocese of Los Angeles (Bishop Alemany, Bishop Amat, Bishop Montgomery, Bishop Cantwell, Bishop Conaty, Bishop Mora Salesian, Bishop Garcia Diego, Cathedral, Damien, Daniel Murphy, Junipero Serra, Our Lady of Loretto, Paraclete, Pater Noster, Pius X, Regina Caeli, St. Bernard, St. Bonaventure, St. Joseph (Lakewood), St. Joseph (Santa Maria), St. Michael, St. Paul, Santa Clara and Verbum Dei) and certain Catholic high schools within the geographical boundaries of the Diocese of Orange (Mater Dei and Rosary).

"pregnant with the dangers of excessive government direction of church schools and hence of churches."

Second, Board jurisdiction interferes with the Free Exercise of Religion. The decisions and philosophies of the Church and Church schools respecting the techniques and organization of Catholic education will inevitably be subject to the surveillance and decisions of the Board incident to any allegations of unfair labor practices, or any disputes respecting appropriate bargaining units.

The impact of Board jurisdiction on the privacy, the freedom and the character of Catholic education is exemplified by Board treatment of issues arising in the case now pending before the Ninth Circuit.

For example, and limited to the Board's brief exposure to these Schools:

(1) Not only does it find that the Schools are not "completely religious," it also finds that these Schools are not even "intimately involved with the Catholic Church."

(2) It demonstrated its misunderstanding of the concept of "Community of Faith," discussed below, when it dismissed such a concept in a footnote as "irrelevant" and "without any significance" to the bargaining unit question.

(3) In another footnote, it originally determined that a decision of the Vatican to create a new Diocese on a specific day was "speculative" and equated it with a commercial employer's decision to subcontract.

(4) It has issued an unfair labor practice complaint which sought to compel one of these Schools to have the number of periods in a school day which the Board felt appropriate, as opposed to what the school itself had selected.

ARGUMENT.

I

Introduction.

The Board has improperly rationalized its decision to assert jurisdiction over religiously associated institutions which are not "wholly religious." *Cardinal Timothy Manning, A Corporation Sole* (1976), 223 NLRB 1218. One admission in the Board's brief before the Ninth Circuit respecting the "wholly religious" standard reflects the Board approach:

> "Contrary to the Employer's assertion, the Board's determination that under its standards the archdiocesan high schools are not 'completely religious' reflects no 'policy for deciding First Amendment issues in religious school cases.' The Board's determinations in this regard *are not based upon First Amendment considerations,* but upon considerations of how best to effectuate the policies of the Act." [Emphasis added.]
>
> Brief of National Labor Relations Board in *Cardinal Timothy Manning, etc., et al. v. N.L.R.B.* (9th Cir., No. 77-1286), p. 9.

The Board's willingness to ignore First Amendment considerations resulted in the finding that these *Catholic high schools are not "religious institutions intimately involved with the Catholic Church," Cardinal Timothy Manning, A Corporation Sole,* 223 NLRB at 1218 [emphasis added]. This finding and the Board's approach foreshadow future Board treatment of Catholic high schools.

Contrary to the assertion of the Board as quoted above, the Board has no power to "effectuate the policies of the Act" without due, careful regard for

First Amendment considerations. In short, the Board has consistently failed to confront the dimension and importance of the constitutional issues:

Does the legislative scheme of the Act—designed for regulation of commerce and preservation of peace in the industrial and commercial sectors—have any constitutional place in schools whose sole reason for existence is to teach Catholic doctrine, to teach as Jesus did?

Can such a legislative scheme formulated for application in commercial contexts be administered and enforced without enduring injury to and entanglement with Church schools, and hence, Churches?

Thus, the arguments of the Board before this Court and before the Ninth Circuit do little justice to the import of the First Amendment. perhaps because their positions reflect little recognition of the reality that religious worship, like all First Amendment freedoms, "need[s] breathing space to survive." *NAACP v. Button* (1963), 371 U.S. 415, 433. *See also, e.g.,* Comment, "The Free Exercise Clause, the NLRA, and Parochial School Teachers," 126 U.Pa.L.Rev. 631 (1978).

II

Catholic High Schools Are an Integral Part of the Religious Mission of the Catholic Church.

Religion and the sectarian mission of the Catholic Church permeate the classes and activities of each Catholic high school. In *Lemon v. Kurtzman* (1971), 403 U.S. 602, 29 L.Ed.2d 745, the Supreme Court held that state aid programs, intended to subsidize the teaching of secular subjects at Catholic schools, were invalid under the First Amendment. The factors

considered significant by the Supreme Court in *Lemon* in concluding that religion permeated the schools apply to the schools involved in the case now pending before the Ninth Circuit.

(1) The schools are maintained in proximity to Catholic churches. *Lemon,* 403 U.S. at 615. Some schools have student chapels in which religious observances are conducted.

(2) Religious symbols and other visible reminders of the religious mission of the Church are ubiquitous on each high school campus. There are crucifixes, religious art, and other religious objects in classrooms and on the premises of each school. *Lemon,* 403 U.S. at 603.

(3) The principals of Catholic high schools prefer to employ religious teachers (either members of various Catholic orders or diocesan clergy) rather than lay teachers on their staffs. Also, they prefer to have Catholic lay teachers rather than non-Catholic lay teachers.

(4) The teachers, mostly Catholic, are subject to religious control and direction. *Lemon,* 403 U.S. at 618.

(5) Catholic school teachers are advised and instructed to stimulate interest in religious vocations. *Lemon,* 403 U.S. at 618.

(6) The Schools sponsor religiously oriented extracurricular activities. *Lemon,* 403 U.S. at 615.

(7) Religious formation is not confined to formal religion courses or a single subject. Instead, the philosophy and doctrine of Catholicism is introduced and taught whenever possible and appropriate. *Lemon,* 403 U.S. at 618.

The goal of education at the Schools is to make each individual aware that the religious dimension of his or her life applies every hour of the day and every day of the year. It is the practice at each of the Schools to permeate secular courses and all aspects of school life with Catholic teachings and values. As one of the Union witnesses testified, the "subliminal religious example provided by the lay teacher does permeate every secular course." It is the responsibility of teachers, lay as well as religious, at every Catholic high school to permeate every course and every other activity in which they are involved with the Catholic philosophy, faith, and morals. One witness testified as to at least three ways in which teachers of subjects like physics or chemistry import religious formation to students.

In short, religious purpose dominates all activity, curricula, and educational techniques of the Schools. As in *Lemon,* these Schools are an integral part of the religious mission of the Catholic Church since these Schools are "a powerful vehicle of transmitting the Catholic faith to the next generation." *Lemon v. Kurtzman,* 403 U.S. at 616. The integration of religious truth and values with life distinguishes the Catholic school from all other schools, particularly the public schools over which the Board has no jurisdiction.

III

The Board's Bargaining Unit Determinations Exemplify the Inevitable Interference With the Free Exercise of Religion Caused by Board Jurisdiction.

A unique aspect of the case now pending before the Ninth Circuit is the impact of the Board's bargaining unit determinations on the individual, autonomous "Community of Faith" of each Catholic high school. The Board originally ordered a union election at 26 high schools.[3] Although that single bargaining unit was later divided into two separate units, the Schools contend that such multi-school units interfere with the "Community of Faith" at each Catholic high school.

A. The Concept of a "Community of Faith" at Each Catholic High School Is a Fundamental Precept of Catholic Education and Religion.

It is essential to the realization of the religious mission of each Catholic school that it create and serve its own unique "Community of Faith." Each school has its own Community of Faith which is individual for that school and which differs from school to school. This religious concept involves the religious teachings of the Church, with teachers, parents, students, and administrators developing this Community. The character of each Community of Faith is based, in part, on the cultural traditions and needs of the students, the traditions of the religious orders which teach in the Schools, the abilities and vocational and spiritual goals of the students, and the different ethnic backgrounds of people associated with the school. For example, the Community of Faith at Verbum Dei High School, a predominately black school located in the center of Watts, is different from that at Cathedral High School, whose student body is composed almost entirely of students from a Mexican-American cultural background. And the Community of Faith is again different at Bishop Montgomery High School, where the students' parents are better educated than the average parent, and expect their children to follow in their footsteps. The concern of teachers at Bishop Montgomery is to get their students into colleges, while efforts of Cathedral High School teachers are to have their students rise above a ninth grade reading level.

[3]Only by lumping the revenues of these Schools together was the Board able to meet its own jurisdictional standard of $1,000,000. 29 CFR §103.1. Only one of the schools has ever met this standard.

The Schools in the bargaining unit include some schools which are coeducational, all boys, all girls, inner city, and suburban. Four are inner-city all-boy schools. Seven are large coed suburban schools. Four are inner-city all-girl schools. Five are small coed schools. Three are all-boy suburban schools. One school is shifting from a predominately white to a predominately minority student body. Two are all-girl suburban schools. These differences have a profound effect upon the identity of the school and its administration and its Community of Faith. Even within these categories, there are significant differences between the schools because of their different geographical locations and the makeup of their student bodies.

The diverse religious orders involved in the Schools have a different community, a different spirit, and therefore different goals in the administration of the school which they head. These differences have a deep historical background and significance and are expressly recognized and encouraged by the highest laws of the Catholic Church. It is the goal in the Los Angeles

Archdiocese to turn over the administration of all Catholic high schools owned by the Education and Welfare Corporation to religious orders.

In recognition of the distinct and unique characters of the Schools, and their religious mission, each high school operates as a distinct, separate, and autonomous entity. Each principal possesses the authority to develop policies with respect to the implementation of the religious mission at his or her school. In this regard, each principal may and does independently make the following determinations:

> (a) The development of spiritual traditions, philosophies, and Community of Faith. The differences between the schools in these respects reflect the differences in the types of schools (inner city, suburban, large, small, all girls, all boys, coeducational), the spiritual traditions of the religious order or orders which operate or teach in the schools, and the differences in the neighborhoods in which the schools are located, among other factors.
>
> (b) Determinations with respect to the policy regarding religious practices such as prayers, formal services, celebrations, etc.

B. The Board's Bargaining Unit Determinations Are Destructive of the "Communities of Faith."

Each School's independence is essential to the realization of its religious mission and its Community of Faith. Teachers, administrators, parents, and students develop this concept based upon, *inter alia,* the cultural traditions and needs of the students, the different ethnic

backgrounds of people associated with the Schools, the abilities and vocational and spiritual goals of the students, and the traditions of the religious orders which teach in the Schools. The Board dismissed the doctrine of Community of Faith in a footnote, finding that the Schools' student body composition and geographical location were "irrelevant" and "without any significance." 223 NLRB at 1219, n.6.

The Community of Faith requires not only autonomy, but also, as the term implies, a sense of community unencumbered by artificial structures and reorganizations imposed by government. In *Caulfield v. Hirsch* (E.D.Pa. July 7, 1977, No. 76-279), 95 LRRM 3164, the District Court provided an example of the injury suffered by private Catholic schools arising from the Board's definition of appropriate bargaining units.

> "Here, the NLRB has devised and sanctioned the division of lay teachers from religious teachers, affording to the former group the potential benefits of NLRB protection and regulation while excluding those to the latter. This division, though characterized as neutral or secular in purpose and effect by the defendants, burdens the free exercise of the Church schools' belief in a single undivided community of faith as contemplated by the schools' religious mission. Plaintiffs' testimony establishes this belief and certainly suggests that a divisiveness or competitive interface between and among the lay and religious faculty members would work a harm to the religious goals and objectives of the pastors and their Church. * * * This [sectarian] mission is the inculcation of religious

values in the school children, and it has been testified to by the plaintiffs that a *unified* faculty devoted to the impressment of these values in the children is essential." [Emphasis in original.]

Caulfield v. Hirsch, No. 76-279, Slip Op. at 27-28, 95 LRRM 3164, 3176.

See also, e.g., Roman Catholic Diocese of Brooklyn (1978), 236 NLRB No. 3, 98 LRRM 1359.

The First Amendment guarantees that the Church, not the Board, has the power to decide whether the Church can best implement its mission through a unified system of high schools, or through a group of schools which operate with autonomy and distinct Communities of Faith. The Church has already decided that the latter method will best serve its mission.

In its decision, relegated to a mere footnote, the Board considered the impact of the Vatican's decision to create a new diocese for Orange County. The Board stated:

"In our view, the effect of the creation of the diocese . . . is dependent upon facts which are uncertain at present and therefore speculative."

Cardinal Timothy Manning, A Corporation Sole, 223 NLRB at 1221, n.12.

The Board continued that the election would probably be held well before such change occurred, "*if* [*the change occurs*] *at all.*" [Emphasis added.] *Id.* at n.12.[4] With due respect to the Board, it is improper to refer, as the Board did, to the Vatican's announcement of the creation of a new diocese on a particular

[4]The Board did reconsider and revise its Decision on this point following the Schools' Motion for Reconsideration.

date as "uncertain" and "speculative." It is inappropriate to compare, as the Board did, the Vatican's announcement of the creation of a new diocese on a particular date to such industrial acts as subcontracting and planned mergers of capitalistic enterprises. In *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, 49 L.Ed.2d 151, the Supreme Court held that there had been improper judicial interference with church decisions and ecclesiastical matters in violation of the First Amendment. It further held that "[i]t suffices to note that *the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs;* . . . ." [Emphasis added.] *Id.,* 426 U.S. at 721, 49 L. Ed.2d at 170.

C. The Board's Interference With the "Communities of Faith" Violates the Free Exercise Clause of the First Amendment.

To interfere with each school's independence by combining them, or some of them, in a single bargaining unit and requiring them to bargain on this basis imposes a structure, not selected or agreed to by the Schools, and abridges the free exercise of religion. As stated by the Supreme Court:

"[A] further reason for neutrality is found in the free exercise clause which recognizes the value of religious training, teaching and observance and more particularly the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state."

Abington School Dist. v. Schempp (1963), 374 U.S. 203, 222, 10 L.Ed.2d 844, 858.

In *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94, 97 L.Ed. 120, the Supreme Court pointed

out that religious organizations possess the same rights under the First Amendment to be free from governmental interference as are extended to individuals. In that case, the Court invalidated a New York state statute transferring control of Russian Orthodox churches in North America from authorities in Moscow to authorities selected by a convention of American churches. It said:

> "*Legislation that regulates church administration,* the operation of the churches, the appointment of clergy, by requiring conformity to church statutes [adopted by a certain convention within the United States] . . . *prohibits the free exercise of religion.* . . ." [Emphasis added.]
>
> *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 107-108, 97 L.Ed. 120, 132.

Thus, the Supreme Court, under the First Amendment, has precluded civil courts from regulating church administration and the operation of churches. That same prohibition should apply to administrative agencies such as the Board in the exercise of their functions. However, the Board has regulated the administration and operation of the Catholic Church, through the Catholic schools, when it certified the Union as the bargaining representative of employees in multi-school bargaining units. Those units are directly contrary to the well-established, religiously-mandated independence and autonomy of the schools.

As Father Adam Maida, these Schools' canon law expert, testified:

> "I mean here also that the Archdiocese, through its enlightened leadership, has determined that it would have in implementing the documents of Vatican II, especially with respect to Christian education, that it would have schools which are autonomous in order that they might be these communities of faith that I talked about. These schools exist because they are a religious activity, an integral part of the Church's mission in religion, and this is the way they are; this is the way they function; this is the way they exist."

It is well established that, in the absence of fraud or collusion, civil tribunals are bound by the decisions of religious organizations "of hierarchical polity on matters of discipline, faith, *internal organization,* or ecclesiastical rule, custom, or law. * * * Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." [Emphasis added.] *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, 713-715, 49 L.Ed.2d 151, 165-166.

The Board, as a civil tribunal, has no power to question this ecclesiastical judgment as to how Catholic schools ought to be organized and administered.

IV

The Application of the Act to Catholic High Schools Inevitably Entangles Government Authority With the Essential Religious Functions of the Schools.

A. Board Jurisdiction Will Necessarily Involve Surveillance and Improper Direction of Church Schools.

Board jurisdiction necessitates intensive scrutiny of the operations and motives of employers. Despite Board assertions, a Board order requiring the schools to bargain with employees will have a substantial adverse effect on the Schools' religious function.

Mandatory subjects for collective bargaining extend not merely to wages and salaries, but also to disciplinary procedures, professional obligations, duties to conform to specific policies prescribed by the Church as a matter of religious doctrine, and a broad range of issues which might reasonably be considered as part of the "working conditions" of teaching at the Catholic schools. *Cf. Fibreboard Paper Products Corp. v. N.L.R.B.* (1964), 379 U.S. 203.

> "The crux of the problem is that the 'terms and conditions' of employment at some point become inseparable from the religious mission of the Church schools. The schools and their teachings are so pervasively religious that nearly all activities which are appropriate for mandatory collective bargaining embrace or at least relate to religious matters."
>
> *Caulfield v. Hirsch,* No. 76-279, Slip Op. at 29, 95 LRRM 3164, 3176.

In this context, the inability of the Board to actually compel an employer to accept any specific substantive contractual provisions is irrelevant. Through the power to remedy alleged unfair labor practices, in addition to the power to investigate the "good faith" of an employer's bargaining, the Board will hold substantial power over the conduct and operation of Church schools. The Board has repeatedly taken steps to deter or to remedy alleged unfair labor practices, by evaluating the basis for employer policies respecting structure, operations, and employee relations. In so doing, the Board must necessarily pass judgment on the motives for the Schools' policies. In this role, the Board becomes an arbiter of Catholic faith and morals.

The Board has regulated, in great detail, the limits of an employer's right to communicate with employees respecting Board elections.[5] Also, the Board has assumed authority over an employer's decision to close part of its business[6] or to move its business,[7] when such steps were allegedly caused by an anti-union motive. Indeed, already the Board has issued complaints which touch directly upon the right of a Catholic school to determine its hours of operation.[8]

Thus, the breadth and particularity of Board jurisdiction, in fact and in effect, extend to the structure and operation of an enterprise and the freedom of speech of an employer. All of this authority is supplemented by the Union's capacity to demand substantial change through the bargaining process mandated by government. In addition, the government and the Union possess the ability to investigate the activities of an employer pursuant to the requirement that an employer must supply information and data material to the collective bargaining process and to the processing of griev-

---

[5]*N.L.R.B. v. Gissel Packing Company* (1969), 395 U.S. 575; *May Department Stores Company* (1962), 136 NLRB 797.

[6]*Roman Catholic Diocese of Brooklyn* (1978), 236 NLRB No. 3, 98 LRRM 1359. *See also, e.g., Textile Workers Union v. Darlington Mfg. Company* (1965), 380 U.S. 263; *Darlington Mfg. Company* (1967), 165 NLRB 1047, *enforced,* 397 F.2d 760 (4th Cir. 1968), *cert. den.,* 398 U.S. 1023 (1968).

[7]*Garwin Corp.* (1965), 153 NLRB 664, *enforced in part,* 374 F.2d 295 (D.C.Cir. 1967); *Drennon Food Production Company* (1959), 122 NLRB 1359.

[8]In an unfair labor practice complaint involving these Schools herein, the Board accused one of the schools of the following "illegal act":

> "In or about May 1975, respondents, through Rev. Krause, at Respondent Mater Dei, announced their decision to implement a cutback in the length of the school day from eight class periods to seven class periods."

ances.[9] *See, e.g., Caulfield v. Hirsch,* No. 76-279, Slip Op. at 34-35, 95 LRRM 3164. None of this is remote or speculative. These examples represent the factors which must be considered by Church officials when formulating future policies for Catholic schools. Moreover, these examples suggest the potential for excessive governmental direction of the operations of private Catholic schools. *See, e.g., Lemon v. Kurtzman,* 403 U.S. at 620. In *Cap Santa Vue, Inc. v. N.L.R.B.* (D.C.Cir. 1970), 424 F.2d 883, the Court of Appeals provided a descriptive analysis of the surveillance incident to the mandate to bargain in good faith:

> "[G]ood faith contemplates a willingness to enter the discussions 'with an open mind and purpose to reach an agreement consistent with the respective rights of the parties.' *The intent of the parties must be determined, and this can only be done by examining their acts, words and motives.* Thus it will not do to merely enter 'upon a sterile discussion of union management differences,' or 'merely going through the motions of negotiating'. [Citations omitted.]" [Emphasis added.]
>
> *Cap Santa Vue, Inc. v. N.L.R.B.,* 424 F.2d 883, 888.

Thus, when the Board is called upon to inquire into the "good faith" or employer policies of the Schools, religious doctrine will inevitably become a focal point for the litigation. The Board provided excellent examples of this process in its briefs before the Ninth Circuit and before this Court. The Board did not resist the temptation of using its own interpretation of Catholic religious doctrine against

[9] *See, e.g., N.L.R.B. v. Truitt Mfg. Company* (1956), 351 U.S. 149.

Church schools. Citing Church endorsement of collective bargaining, and ignoring the fact that such statements did not concern the issue of government power over Church institutions, the Board sought only to exploit imaginary contradictions drawn from a long history of Church doctrine. Brief of N.L.R.B. in *Cardinal Timothy Manning, etc., et al. v. N.L.R.B.* (9th Cir., No. 77-1286), p. 23, n.11; Brief of N.L.R.B. in *N.L.R.B. v. Catholic Bishop of Chicago* (U.S., No. 77-752), p. 25, n.13. Such differences are precisely the kind of arguments over Canon law and religious doctrine which the Board and the courts must resolve if the Act is to be enforced against Church institutions, but which cannot be resolved or even scrutinized if the First Amendment is to be honored. *Presbyterian Church v. Hull Church* (1968), 393 U.S. 440.

B. Board Jurisdiction Will Inhibit the Free Development of Religious Doctrine in Catholic Schools.

When Catholic law becomes a focal point for labor litigation, as in this case, there is a clear and imminent danger that the Church will be required to calculate the potential costs of litigation and prospective penalties when developing Church policy. Thus, for instance, a Church school official might have to forego his or her right to discharge a lay teacher for teaching blasphemous doctrine, simply because that employee had been active as a Union supporter.

To state the example in another way, even the most technically competent teacher might be dismissed for not adequately contributing to the Community of Faith or the religious mission of the school. If that decision by Church school officials were challenged by the Union, the Board would be required to determine

several issues: (1) Whether the reasons cited by the Church school were the actual reasons for the discharge; (2) whether the Church school's assessment of the teacher's abilities and contribution was reasonably based in fact; and (3) whether the Church school's decision was even partially motivated by an anti-union animus.[10] In such a case, the Board, not the Church school, would be the ultimate arbiter of Catholic faith and morals.

To avoid the time and expense of such litigation, Church school officials will be pressured to tailor their decisions and conduct "to steer far wider of the unlawful zone" of impermissible conduct than might be actually necessary or desirable from a sectarian perspective. *Speiser v. Randall* (1958), 357 U.S. 513, 526. In this manner, Catholic private schools will be subjected and subordinated to a structure and authority independent of ecclesiastical officials. Church school decisions

[10]It will not suffice for a school, in defending against allegations of unfair labor practices, merely to show that it had ample religious or other grounds for its action. For instance, the rule is "well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate [the Act] if it was in fact motivated, *even partially*, by the employee's union activity." [Citations omitted.] [Emphasis added.] *N.L.R.B. v. Pembeck Oil* (2d Cir. 1968), 404 F.2d 105, 109, *vacated on other grounds and remanded sub nom. Atlas Engine Works, Inc. v. N.L.R.B.* (1969), 395 U.S. 828. For example, if a teacher were terminated for advocating abortion (or any other concept contrary to the Church's teachings), the Board or some other tribunal might determine that the school's motivation for the termination resulted "partially" from the employee's union activity. The school might then be required to reinstate a known heretic. Even an attempt to accommodate religious motives for alleged unfair labor practices will require the Board to examine the actuality and sufficiency of the reasons — religious or otherwise — cited by the schools. *See also, e.g.,* Comment, "The Free Exercise Clause, the NLRA, and Parochial School Teachers," 126 U.Pa.L.Rev. 631 (1978).

and faith will be impermissibly directed by the prospect of adverse, coercive, and regulatory governmental action. No longer will a Catholic bishop, or a Catholic high school principal, or any other Church official, be the sole repository of authority as dictated by Church law. This is entanglement which the Supreme Court condemned in *Lemon v. Kurtzman* as "pregnant with the dangers of excessive direction of Church schools, and hence of Churches". 403 U.S. at 620.

These dangers extend to the very existence of private Catholic education. After all, when Church authorities begin to lose control over Catholic schools, Catholic education begins to lose its distinctive character, and its ability to fulfill its unique religious mission. In such circumstances, the Church would confront a tragic and painful dilemma: a decision whether to maintain Catholic education, even if financial problems could be overcome. Understandably, when a commercial enterprise faces a similar problem, the statutory requirements of the Act must continue to be enforced. However, when a choice is put to Church schools because of government action, the constitutional problem is acute. Government regulatory action—including the high cost of dealing with such action—should not be allowed to cause, even in part, the demise of Catholic education. *Cf. Walz v. Tax Commission* (1969), 397 U.S. 664. Government action, especially Board jurisdiction, can so stifle and straitjacket religious worship that the religious must retreat into more private and less "free, open and robust" communication of religion. By any standard, this is not a process or a result which is allowed under the First Amendment. *Cf. New York Times v. Sullivan* (1965), 376 U.S. 254. Thus, the certain prospect of regulatory and compulsory govern-

ment action incident to Board jurisdiction threatens the purpose, the freedom and the existence of Catholic education.

V
Conclusion.

Board jurisdiction is a peculiarly intrusive form of government regulation, when imposed on religious institutions. It is not comparable to the regulation incident to, for example, a local building code. It depends upon intensive ongoing surveillance. It results in extensive litigation like the "confrontations and conflicts" which the Court feared in *Walz*, 397 U.S. at 674. It imposes comprehensive duties to disclose information to an adversary whose status depends solely upon government certification. It places a Church school in a situation in which it must bargain about all working conditions, including those working conditions which are dictated not by economics, nor by labor policy, but by the dictates of religious faith. It requires supervision of school employee and personnel policies, regulating the very operation of the institution, not merely the purchase of inanimate objects like instructional materials, globes and weather forecasting charts. *Compare Wolman v. Walter* (1977), 433 U.S. 229. Finally, it gives government officials an effective right to legislate faith and morals by deciding whether Catholic school conduct is truly based on religious doctrine. In this context, the inescapable conclusion is that Board jurisdiction over Catholic schools is inconsistent with the mandate of the First Amendment that the Church and state shall remain separate.

The Act was designed for the regulation of commerce and the preservation of industrial peace. It has a purpose, a form and an impact which is incompatible with the privacy and freedom of Churches which the First Amendment protects. The Act "does not purport to extend to the relationship between all . . . employees and employers" and "must be construed as contemplating the exercise of control within constitutional bounds. . . ." *N.L.R.B. v. Jones & Laughlin S. Corp.* (1937), 301 U.S. 1, 31-32. In this case, constitutional solicitude for religious liberty requires that the Act and Board jurisdiction not be extended to the high schools of the Catholic Church.

Respectfully submitted,

SHARP WHITMORE,
Attorney for Certain Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange, Amici Curiae.

MICHAEL D. RYAN,
H. FREDERICK TEPKER,
GIBSON, DUNN & CRUTCHER,
Of Counsel.